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No. 749

IN THE

Supreme Court of the United States

OCTOBER TERM, 1964

UNITED AIRCRAFT CORPORATION, *Petitioner*

v.

LODGE 743, INTERNATIONAL ASSOCIATION OF MACHINISTS, AFL-CIO

and

LODGE 1746, INTERNATIONAL ASSOCIATION OF MACHINISTS, AFL-CIO

and

NATIONAL LABOR RELATIONS BOARD, *Respondents*

REPLY BRIEF OF PETITIONER TO OPPOSITION BRIEFS OF THE RESPONDENT UNIONS AND THE NATIONAL LABOR RELATIONS BOARD

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1. The opposition briefs of the Union and the National Labor Relations Board, contrary to their representation, plainly show the need for determination by this Court as to whether a party having solemnly agreed to binding arbitration, to the exclusion of all other procedures or remedies, may pursue such arbi-

tration to an adverse result and then force the other party to a second litigation of those same issues through the bifurcated procedures of the Board—in other words, eat his cake and have it too. Since the federal labor law policy forces a party, through Section 301 of the Act, to honor an arbitration agreement the federal policy must also protect the citizen subject to such from being forced under that policy to defend his position twice—once in the arbitration proceeding and again in a proceeding before the Board.

There may be justice in permitting a person to select between two procedures or modes of remedies, but none in permitting a party to exhaust one avenue of redress to an adverse decision and then pursue another —in other words, have two bites at the same cherry. Said differently, had the Union here backed-off from its agreement for binding arbitration and elected, instead, to file charges with the Board regarding these individuals, a different situation may have been presented. A counter-balancing of the equities in that situation under the federal labor law policy may justify non-enforcement of the arbitration agreement in favor of the Board's jurisdiction--but certainly not after the binding arbitration, voluntarily agreed to, had been pursued to its end.[1]

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[1] The arbitration agreement plainly was not "forced" on the Union. A union of this stature may not be presumed to have been coerced or tricked into such an agreement. In fact, the circumstances clearly indicate that it was the Union, not the Company, which sought arbitration. While the new collective bargaining agreement and the agreement regarding the procedures for returning the strikers to work were signed on about August 11, 1960, the arbitration submission agreement was not signed until about August 24, 1960 (Pet., pp. 4-5). It is obvious that the latter was not a *quid pro quo* for the former and that the Union, if it desired, could have rejected the arbitration.

2. The Union (Opp. Br., pp. 2, 4-6) seeks to escape the foregoing by asserting that neither the language nor the intent of the arbitration submission agreement foreclosed the later filing of unfair labor practice charges regarding the employees involved in the arbitration. The same contention was raised in the Court of Appeals below and disposed of as follows:

> "At the outset we are faced with a question concerning interpretation of the arbitration agreement. The Union argues that it was not the intent of the parties to bar the filing of unfair labor practice charges before the Board, or at least the filing of charges such as are involved in this case. Alternatively, even if the provision of the agreement can be construed as a waiver of the right to file unfair labor practice charges, the Union contends it was not sufficiently clear and unmistakable to be given legal effect. These arguments, however, raise in part questions of fact as to the circumstances of the agreement that cannot be dealt with on a motion to dismiss. *For the purposes of this appeal we must accept the allegation of the Company that the arbitration agreement effectively barred the filing of unfair labor practice charges in connection with the refusal of the Company to grant the thirty-six employees full reinstatement rights.*" (Emphasis added)

The Union has not petitioned, or cross-petitioned, here for review of this holding. The holding stands, therefore, as the law of the case and may not be reviewed on opposition to the Company's petition for certiorari.

3. The Board equivocates in respect to the question here presented by the petition (p. 3) and defends the action of the Court below on "the circumstances of this case" (Opp. Br., p. 2). The special circumstances

cited are, first, that the Board "*might* conclude that the settlement agreement had been so undermined that no effect should be given to any part of it", and, second, "if the strike were found to have been caused by unfair labor practices, the issue decided by the arbitrators *would not necessarily* be dispositive of the rights of the 36 strikers under the Act" (Opp. Br., pp. 6-7; emphasis added).

As to the first hypothetical, the General Counsel's Complaint (quoted extensively in the Appendix to the Board's Brief, pp. 10-21) in no respect attacks the legality of the settlement agreement, and the other party to it, the Union, is actively supporting its legality in its Section 301 suits. As to the second hypothetical, a finding that the 1960 strike "was caused by unfair labor practices" would have to be predicated solely on the allegation in paragraph 29(a) of the General Counsel's Complaint that petitioner here had refused to furnish certain information requested by the Union "on several occasions since September 11, 1953" (Opp. Br., pp. 12-13). But Section 10(b) of the Act prohibits the Board from predicating an unfair labor practice finding on conduct occurring more than six months prior to the charge; this allegation relates to alleged conduct occurring years before. In any event, both hypotheticals, it is submitted, are foreclosed by the unchallenged holding of the Court of Appeals that "the arbitration agreement effectively barred the filing of unfair labor practice charges" in respect to these 36 strikers (*supra*).

4. The mere fact that the Board conditions its opposition on "the circumstances of this case" (Opp. Br., p. 2) strongly suggests that the government agrees that the courts are not prohibited by Section 10(a) of the

Act from enjoining a private party from relitigating matters before the Board previously decided by binding and exclusive arbitration. Rather, the Board seems to be saying that the courts in their discretion should refrain from exercising their power in these situations and defer to the Board's authority. But, where discretion exists it must be exercised with due regard to the rights of all parties. As shown in the petition (pp. 10-12), the Board has no statutory mandate, *sua sponte*, to investigate and remedy unfair labor practices; it may pass only on those brought to it by the citizenry on charges approved by its General Counsel. The Union, the charging party in this matter, had its day in court (the majority of the court of appeals noted that the "arbitration award in this case . . . carries unusual weight"—Pet., p. 11a)—it merely wants a second try at the matter. The only party in the situation with any equity on its side is the petitioner which is being forced against its will to litigate the same matter twice.[2] Under these circumstances, equity clearly dictates that the discretion which the courts may have in matters of this kind must be exercised in favor of requiring parties to adhere to their solemn contractual agreements in accordance with the prevailing federal labor law policy. An exception from this would be justified only under circumstances suggested in the petition (pp. 15-16).

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[2] It is no solace to petitioner that some years hence, after conclusion of protracted proceedings before the Board, it will have opportunity to challenge an adverse decision in this second litigation in a judicial proceeding to review the Board's ultimate order, as the Board suggests (Opp. Br., p. 8). A reversal then will not rectify the unjust injury suffered by petitioner in the meantime. This injury would not be the normal consequence of litigation, but the result of unreasonable double jeopardy.

5. Moreover, petitioner submits that the decisions of the courts below in this matter are also in conflict with the very recent decision of this Court in *Republic Steel Corp.* v. *Maddox*, 58 LRRM 2193, issued January 25, 1965. There this Court held that an individual employee was barred from utilizing the courts when his claim could have been adjusted through the grievance procedures of his union's contract with the employer. In so holding, this Court stated (ibid., p. 2194)—

> ". . . Congress has expressly approved contract grievance procedures as a *preferred* method for settling disputes and stabilizing the common law of the plant. LMRA § 263(d), 29 U.S.C. § 173 (d); § 201(c), 29 U.S.C. § 171(e). . . . Employer interests, for their part, are served by limiting the choice of remedies available to aggrieved employees. . . .
>
> . . . If a grievance procedure cannot be made exclusive, it loses much of its desirability as a method of settlement. . . ." (Emphasis added)

If an individual should be prohibited, as in the *Republic Steel* case, from pursuing his normal rights in a court of law because his statutory bargaining agent has agreed to settle such disputes through arbitration, it seems, *a fortiori*, that a union, which has voluntarily agreed to settle its disputes through binding and exclusive arbitration, likewise should be prohibited from pressing a grievance before another tribunal, especially after the matter has been carried to an adverse result in arbitration.

We realize that it is difficult for the private citizen to overcome a statement by a governmental agency, with the sanction of the Solicitor General as here (Board Opp. Br., p. 5), that the "decision of the court

below is correct, there is no conflict of decisions, and there is no occasion for further review". The collective prestige of the government in making such a statement is pitted against the individual representation of the citizen. But petitioner sincerely submits that the action of the courts below in this case conflict with the principals of federal labor law enunciated by this Court and merit the consideration of this Court.

WHEREFORE, the petition for certiorari should be granted to review the important question of federal labor law presented.

Respectfully submitted,

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